Supreme Court, U.S.
FILED
DEC 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-892

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THE CITY OF SEATTLE,
Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

MARK H. SIDRAN
City Attorney
ROBERT D. TOBIN
Assistant City Attorney
600 Fourth Ave.
Seattle, WA 98104
(206) 684-8200

LOUIS R. COHEN *
LLOYD N. CUTLER
TERESA D. BAER
MARK D. CAHN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Petitioner

December 1990

* Counsel of Record

QUESTION PRESENTED

Does the mere designation of a church building as a landmark, with resulting restrictions on the destruction or alteration of the building's exterior, violate the Free Exercise Clause of the First Amendment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED	2
STATEMENT	2
A. Statement of Facts	2
B. Proceedings Below	6
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Alger v. City of Chicago, No. 90C2778, 1990 U.S. Dist. LEXIS 12492 (Sept. 19, 1990), *motion for reconsideration filed* (N.D. Ill. Oct. 3, 1990)	17
Bowen v. Kendrick, 487 U.S. 589 (1988)	16
Employment Division v. Smith, 110 S. Ct. 1595 (1990)	*passim*
First Covenant Church v. City of Seattle, 114 Wash. 2d 392, 787 P.2d 1352 (1990)	*passim*
Hernandez v. Commissioner, 109 S. Ct. 2136 (1989)	12, 15, 16, 17
Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688 (1990)	*passim*
Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)	10, 12, 17
Michigan v. Long, 463 U.S. 1032 (1983)	7, 9
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	17
New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988)	8, 12
Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986)	8
Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978)	*passim*
Salvation Army v. Department of Community Affairs, No. 89-5707, 1990 U.S. App. LEXIS 19352 (3d Cir. Nov. 5, 1990)	13
Society of Jesus in New England v. Boston Landmarks Comm'n, Nos. 87-3168, 87-4751, 87-6586 (Mass. Super. Ct. Nov. 2, 1989), *appeal docketed*, No. SJC-5415 (Mass. argued Nov. 6, 1990)	17
St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990)	*passim*
Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985)	16
United States v. Lee, 455 U.S. 252 (1982)	13
Wisconsin v. Yoder, 406 U.S. 205 (1972)	15
Witters v. State Comm'n for the Blind, 112 Wash. 2d 363, 771 P.2d 1119, *cert. denied*, 110 S. Ct. 147 (1989)	7

TABLE OF AUTHORITIES—Continued

Constitution, Statutes, and Ordinances Page

U.S. Const. amend. I 2
U.S. Const. amend. XIV 2
28 U.S.C. § 1257(a) (1988) 2
N.Y.C. Admin. Code § 25-302(n) (1986) 14
Seattle Municipal Code 25.12 *et seq.* (1977) ..... *passim*
Seattle Ordinance 112425 (1985) 2, 5, 6

Miscellaneous

2 E. GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 315 (rev. ed. 1989) 19
Note, *Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution*, 63 N.C.L. REV. 404 (1985) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ———

THE CITY OF SEATTLE,

Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

---

PETITION FOR A WRIT OF CERTIORARI

The City of Seattle respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.[1]

OPINIONS BELOW

The decision of the Washington Supreme Court is reported at 114 Wash. 2d 392, 787 P.2d 1352 (1990), and is reproduced in the Appendix ("App.") at 1a-27a. The order of the Washington Court of Appeals certifying a direct appeal to the Washington Supreme Court and the ruling of the Washington Supreme Court accepting certification are unreported and are reproduced at App. 28a-29a. The decisions of the Superior Court for King County, Washington are unreported and are reproduced at App. 30a-40a.

---

[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that it is a municipality and, as such, has no parent companies or subsidiaries.

JURISDICTION

The judgment of the Washington Supreme Court was entered on March 22, 1990. Petitioner's motion for reconsideration was denied on September 12, 1990. The petition for a writ of certiorari is therefore due on December 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Seattle Landmarks Preservation Ordinance (Ordinance 106348), codified at Seattle Municipal Code ("SMC") 25.12 *et seq.* (1977), and Ordinance 112425 (1985) of the City of Seattle are reproduced at App. 42a-84a.

STATEMENT

A. Statement of Facts

1. *The Landmarks Ordinance.* In 1977, petitioner, the City of Seattle, recognizing the need for a comprehensive scheme to preserve its historic, cultural and architectural heritage, adopted a Landmarks Preservation Ordinance authorizing the designation and protection of landmarks. SMC 25.12 *et seq.* (App. 42a-81a). The ordinance was based on findings of the City Council that the preservation and perpetuation of landmark objects and sites were "required in the interest of prosperity, civic pride and

general welfare of the people," and that "the economic, cultural and aesthetic standing of [the] City cannot be maintained or enhanced by disregarding the heritage of the City and by allowing the unnecessary destruction or defacement of such cultural assets." SMC 25.12.020(A) (App. 42a). Among the stated purposes of the ordinance were: (1) to designate, preserve and protect those objects and sites which reflect significant elements of the City's cultural, aesthetic, social, architectural and historic heritage; (2) to foster civic pride in the beauty and accomplishments of the past; and (3) to protect and enhance the City's attraction to tourists and visitors. SMC 25.12.020(B) (App. 42a).

Under the Landmarks Preservation Ordinance, an object, site or improvement may be designated for landmark preservation if it is more than twenty-five years old and "has significant character, interest or value, as part of the development, heritage or cultural characteristics of the City, state or nation[.]" SMC 25.12.350 (App. 53a). In order to qualify for landmark designation, a structure must fit within at least one of six categories, two of which are pertinent here: (a) structures that "embod[y] the distinctive visible characteristics of an architectural style, or period, or of a method of construction"; and (b) structures that, "[b]ecause of prominen[t] . . . spatial location, contrasts of siting, age or scale, [are] . . . easily identifiable visual feature[s] of [their] neighborhood or the City and contribute[] to the distinctive quality or identity of such neighborhood or the City." SMC 25.12.350(D), (F) (App. 53a, 54a).

The ordinance established a comprehensive procedural framework for designating and protecting landmarks. A Landmarks Preservation Board (the "Board") was created and charged with the responsibility of identifying objects, improvements and sites worthy of preserva-

tion. SMC 25.12.270 (App. 49a).[2] In order to be considered for designation, a structure must first be nominated for landmark status, and the Board must approve the nomination at a public meeting. SMC 25.12.370; 25.12.380 (App. 54a; 55a). If the Board approves the nomination, it then holds a public hearing to receive evidence and hear oral argument on whether the site, improvement or object meets the ordinance criteria and whether it merits landmark designation. SMC 25.12.420 (App. 57a). If the Board approves the designation, the staff of the Board and the property owner attempt to agree on controls to protect the landmark features of the property (SMC 25.12.490) (App. 59a-60a); if agreement is not possible or the Board does not approve an agreement, the matter is referred to a hearing examiner to recommend controls. SMC 25.12.530 (App. 61a). The Board or hearing examiner then recommends the controls to the City Council. SMC 25.12.510; 25.12.610 (App. 60a; 65a). If the City Council accepts the recommendation, a further ordinance is enacted designating the landmark and requiring the landmark owner to secure a Certificate of Approval from the Board for any alteration or demolition of the structure's historically significant features. SMC 25.12.650 (App. 66a-67a).

2. *The Building.* Respondent, First Covenant Church of Seattle, was organized by Swedish immigrants in 1889. The present church building, designed by architect John Creutzer, was erected in 1910-11 and is an important architectural landmark. (App. 85a-88a). The church's most readily identifiable feature is its ribbed elliptical dome and classical cupola, which rise from behind a parapet wall. (App. 87a). The church is one of only three domed structures of its type remaining in

---

[2] The Board consists of eleven members and is required to include at least two architects, two historians, one representative from the City Planning Commission, one structural engineer, one representative from the field of real estate management, and one representative from the field of finance. SMC 25.12.270 (App. 49a).

Seattle. (App. 88a). The building is a significant element of the City's Swedish heritage, and enjoys a prominent location. *Id.* As noted in the church's landmark nomination, the building, in its location, "contributes to the distinctive identity of the surrounding neighborhood." *Id.*

3. *Designation of the Building.* The Board nominated the church building as a landmark on October 15, 1980. (App. 82a). After a public hearing on January 7, 1981, the Board voted to approve the landmark designation and voted on April 22, 1981 to adopt controls on alterations to the exterior of the church building. The matter was referred to a hearing examiner who, after a hearing, recommended on July 2, 1981 that the exterior of the church be preserved. (App. 91a-95a). On February 26, 1985, the Seattle City Council's Land Use Committee affirmed the recommendations of the Board and the Hearing Examiner. (App. 82a).

On September 17, 1985, the Seattle City Council accepted these recommendations and enacted an ordinance (No. 112425) (App. 82a-84a) acknowledging the designation of the First Covenant church building as a landmark and requiring the respondent to obtain a Certificate of Approval before undertaking certain alterations to the building's exterior. The City Council concluded that the church building satisfied two criteria under the Landmarks Preservation Ordinance: (1) it "embodies the distinctive visible characteristics of an architectural style, period or of a method of construction," and (2) because of the building's prominent location, "it is an easily identifiable visual feature of its neighborhood or the city and contributes to the distinctive quality or identity of such neighborhood or the city." (App. 83a). Acknowledging the religious purpose of the structure, the City Council included the following provision:

> Nothing herein shall prevent any alteration of the exterior when such alterations are necessitated by

changes in liturgy, it being understood that the owner is the exclusive authority on liturgy and is the decisive party in determining what architectural changes are appropriate to the liturgy. When alterations, necessitated by changes in liturgy are proposed, the owner shall advise the Landmarks Preservation Board in writing of the nature of the proposed alterations and the Board shall issue a Certificate of Approval.

Ordinance 112425, Section 2. (App. 83a).

B. Proceedings Below

1. *The Trial Court.* On January 21, 1986, respondent brought suit in Superior Court, King County, seeking a declaratory judgment that the Landmarks Preservation Ordinance does not apply to churches or, if it does apply, that it violates the freedom of religion provisions of the Washington Constitution and that the ordinance designating the First Covenant church building as a landmark was void.[3] On August 25, 1986, respondent filed a motion for partial summary judgment contending, *inter alia*, that the ordinances violated the Free Exercise Clause of the First Amendment to the United States Constitution. On October 8, 1986, the Superior Court denied respondent's motion for partial summary judgment, holding that church buildings are subject to the Landmarks Ordinance and that the federal and state constitutional challenges were premature "[u]nless and until the city undertakes to apply the ordinance in a manner that in some way impinges upon the undoubted constitutional right of the plaintiff to operate its religious property without interference from the City." (App. 39a). On October 1, 1987, the Superior Court denied respondent's second motion for partial summary

[3] Respondent has no current plans to modify or alter the exterior of the church building. (App. 38a). Respondent's "opposition to designation is based on the possibility that it may wish to make exterior alterations at some time in the future." (App. 99a).

judgment and granted petitioner's motion for partial summary judgment. (App. 32a-35a). On October 27, 1988, the Superior Court dismissed respondent's remaining causes of action. (App. 30a-31a). Respondent appealed the trial court's decisions to the Court of Appeals, which on August 7, 1989 certified a direct appeal to the Washington Supreme Court. (App. 29a).

2. *The Washington Supreme Court.* In a 5-4 decision, the Washington Supreme Court reversed. The majority rejected the City's argument that a constitutional challenge was premature prior to any occasion for enforcing the ordinance. (App. 4a-7a).[4] The majority then held that Seattle's two ordinances infringed respondent's First Amendment right to free exercise of religion. (App. 7a-18a).[5] The majority interpreted this Court's decisions as

---

[4] The court focused on several "impacts" that respondent alleged occurred immediately upon the designation of the building as a landmark: interference with the respondent's freedom to alter the building's exterior; a need for secular approval of any proposed alterations "requiring additional paperwork, negotiations and hearings"; a limitation on the respondent's ability to sell its property; and the "uncertainty" of discretionary approval in planning any exterior change. (App. 5a). In addition, although there was no finding of fact, the court credited an affidavit filed in the trial court in opposition to petitioner's motion for summary judgment, stating that landmark designation "resulted in a depreciation in the market value of the property from $700,000 to $400,000." *Id.*

[5] The Washington Supreme Court referred twice to the freedom of religion provision of the Washington Constitution. *See* App. 8a; 18a. However, the court relied exclusively on its understanding of this Court's First Amendment free exercise jurisprudence in reaching its decision. Indeed, the one Washington Supreme Court decision alluded to in the majority's freedom of religion discussion, *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1122-23, *cert. denied*, 110 S. Ct. 147 (1989), is cited solely for the state court's analysis of this Court's free exercise decisions. (App. 8a; 18a). Plainly, "the adequacy and independence of any possible state law ground is not clear from the face of the opinion," *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), and review of the federal question by this Court is appropriate.

requiring strict scrutiny analysis because the "ordinances at issue require the church to seek secular approval of any proposed change to the church's facade requiring a building permit" (App. 13a), a requirement the court described as "potentially affecting the Church's practice of its religion." (App. 14a). The court then held that landmark protection is not a compelling state interest and therefore could not justify this potential burden. (App. 16a). The majority rejected petitioner's contention that any potential burden was eliminated by the "liturgy" exception, which the City had said would exempt any change respondent might "choose[] to make to the exterior of the structure for religious purposes" (App. 26a); the majority found the exception "a vague and unworkable criterion" (App. 15a) that would not eliminate the need for respondent to deal with secular authorities.[6]

In a concurring opinion, three justices, although joining the majority opinion, stated that in their view the pertinent burden on respondent was the alleged reduction in the market value of its property attributable to the ordinance. Although recognizing that this Court's decision in *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990), "shows that a financial burden does not constitute a per se free exercise violation" (App. 21a), the concurring justices declined, without explanation, to apply *Swaggart* to this case.

Four justices dissented. They concluded that the court should simply confirm the City's concession that any changes "for religious purposes" were expressly exempted from landmark review. (App. 26a). They rejected as premature any challenge to the administrative

---

[6] In so holding, the majority ignored this Court's ruling in *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 15 (1988), that "it would be quite unusual if the [City] 'could not construe its own statutory mandate in the light of federal constitutional principles'" (quoting *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986)).

burden imposed by the statute and said that in any event:

> [T]o suggest that the requirement the church and landmarks board "shall jointly explore such possible alternative design solutions as may be appropriate or necessary to preserve the designated features of the landmark" . . . is an excessive burden on the "free exercise of religion" is to trivialize the great protections of the First Amendment.

(App. 27a).

Petitioner's petition for reconsideration was denied without comment on September 12, 1990.

REASONS FOR GRANTING THE PETITION

This case presents the important question whether landmark-designation legislation can constitutionally be applied to buildings owned by religious institutions. The Washington Supreme Court struck down, as inconsistent with the Free Exercise Clause of the First Amendment, petitioner's efforts to preserve and protect the exterior of a church as an architectural, aesthetic and historic landmark.[7] Applying strict scrutiny analysis, the state court ruled that landmark preservation "is not a compelling state interest" (App. 17a) and that the burden of potentially having to seek secular approval of changes to a church exterior, together with the alleged reduction of the market value of church property as a result of landmark designation, outweighed any interest in protecting a landmark. If it were correct, the state court's interpretation of the First Amendment would make landmark protection of church buildings virtually impossible.[8]

---

[7] As noted in n.5, *supra*, the Washington Supreme Court also referred to the freedom of religion clause of the Washington State Constitution but did not clearly indicate reliance on an adequate and independent state ground. *See Michigan v. Long*, 463 U.S. at 1040-41.

[8] Indeed, the rationale of the decision extends beyond buildings used for religious purposes and beyond landmark regulation. Struc-

This Court should review this decision for three reasons. First, the decision is in direct conflict with the Second Circuit's recent decision in *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990). In *St. Bartholomew's Church*, the court dismissed a free exercise challenge to New York City's Landmark Ordinance as applied to a building owned by a church, explicitly rejecting the same arguments relied upon by the Washington Supreme Court here.

Second, the decision is inconsistent with this Court's free exercise cases. The Washington Supreme Court held that application to a church of a neutral regulation of general application, even one that is not alleged to compel (or prohibit) any action that the church's religion forbids (or commands), is subject to strict scrutiny analysis. That decision is flatly inconsistent with this Court's recent decisions, including *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990), and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988).

Finally, this case presents a constitutional issue of general importance. Every state, and over five hundred municipalities, have passed legislation to preserve and protect historic structures. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 107 (1978). Inconsistency and confusion over the constitutionality of applying such legislation to the large number of historic religious structures are a matter of significant concern not only to the parties here but also to every community that seeks through landmark legislation to preserve its physical heritage.

---

tures used by a religious organization exclusively for secular purposes also could not be landmarked, since doing so might require the organization to deal with secular authorities and might reduce the value of the structures. And every form of land use regulation that had these consequences would also be subject to strict scrutiny.

1. *Conflict of Decisions.* The Washington Supreme Court and the Second Circuit reached opposite answers to the question whether the designation of a church building as a historic landmark violates the Free Exercise Clause. In *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), the New York City Landmarks Preservation Commission had denied a church's application to demolish a landmarked building, the church's "Community House," in order to permit the church to construct a 47-story office tower in its place. The church argued that New York City's Landmarks Law, facially and as applied to the church, violated the church's freedom of religion by involving the government in the church's decisions as to the use of its property and by denying the church the opportunity to exploit fully the financial value of its property. *Id.* at 353-54.

In contrast to the Washington Supreme Court, the Second Circuit rejected these arguments. Citing recent free exercise decisions of this Court, the Second Circuit observed that "while the government may not coerce an individual to adopt a certain belief or punish him for his religious views, it may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers." *Id.* at 354. The critical distinction, the court noted, is "between a neutral generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented." *Id.* (citing *Smith*, 110 S. Ct. at 1599). New York City's landmark legislation (like Seattle's) is a "facially neutral regulation of general applicability within the meaning of Supreme Court decisions," *St. Bartholomew's Church*, 914 F.2d at 354; under this Court's decision in *Smith*, the First Amendment does not restrict the application of such regulatory statutes to religious institutions and conduct. *Id.*[9]

---

[9] In contrast to St. Bartholomew's Church, which had been denied permission to demolish a landmarked building, respondent here has

The Second Circuit acknowledged that the Landmarks Law "drastically restricted the Church's ability to raise revenues." *Id.* at 355. The court recognized, however, that the decisions of this Court foreclose a reading of the First Amendment that would elevate such a financial "burden" to a level of constitutional significance. In contrast to the majority (particularly the concurring opinion) of the Washington Supreme Court, the Second Circuit ruled: "[N]eutral regulations that diminish the income of a religious organization do not implicate the free exercise clause. . . . The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices." *Id.* (citing *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988); and *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2149 (1989)). Since St. Bartholomew's Church had failed to "show discriminatory motive, coercion in religious practices, or the inability to carry out its religious mission in its existing facilities," *St. Bartholomew's Church*, 914 F.2d at 355, the court found no free exercise violation.

St. Bartholomew's Church had also suggested that the Landmarks Law involved an "excessive degree of entanglement between church and state" because it required the church to seek a certificate of appropriateness for certain alterations. *Id.* at 356 n.4. Relying on this Court's decision in *Swaggart*, 110 S. Ct. at 697-99, the Second Circuit rejected this argument, observing: "[t]he only scrutiny of the Church occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural. *St. Bartholomew's Church*, 914 F.2d at 356 n.4. The court concluded: "[t]his degree of interaction does not rise to

---

challenged its mere designation as a landmark. *Cf. New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988).

the level of unconstitutional entanglement." *Id.* This conclusion was flatly inconsistent with the Washington Supreme Court's holding that a regulation subjecting a church's possible development and building plans to secular approval violated the First Amendment. (App. 16a).

2. *Conflict With This Court's Free Exercise Jurisprudence.* Review is further warranted in this case because the decision of the Washington Supreme Court is squarely contrary to this Court's free exercise decisions. The state court erred in holding that a neutral regulation of general application can violate the Free Exercise Clause when applied to a church. The court further erred in holding that the administrative and financial burdens imposed by Seattle's landmark legislation were of constitutional significance, requiring the City to justify those burdens by showing a compelling state interest.

a. In *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), this Court rejected the notion—central to the state court's decision here—that application of a neutral, generally applicable regulation to matters touching upon religion implicates the Free Exercise Clause. As this Court observed in *Smith* (which unlike this case involved a religious *practice*), "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 1600 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). Under *Smith*, a generally applicable statute that is not specifically directed at religious practice is "not susceptible to a free exercise clause challenge." [10]

Seattle's Landmarks Preservation Ordinance is a facially neutral regulation of general applicability. *Cf. St.*

---

[10] *Salvation Army v. Department of Community Affairs*, No. 89-5707, 1990 U.S.App. LEXIS 19352 (3d Cir. Nov. 5, 1990) at 16.

Bartholomew's Church, 914 F.2d at 354.[11] The fact that application of this legislation may require a church, like any other owner of a historic property, to deal with secular authorities and may affect the property's market value does not implicate the Free Exercise Clause of the First Amendment. *Smith*, 110 S. Ct. at 1600.

In *Smith*, this Court noted that it has "never held that an individual's religious beliefs excuse him from compliance from an otherwise valid law prohibiting conduct that the state is free to regulate." *Id.* Respondent has not suggested that Seattle's landmark ordinances regulate its religious beliefs—or discriminate against them.[12] Nor has respondent challenged Seattle's power to regulate the alteration of historic and architectural landmarks generally; indeed, the validity of landmark preservation laws was specifically affirmed by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 107 (1978). Rather, respondent contended—and the state court held—that these "otherwise valid" regulations and prohibitions may not be applied to a religious institution. This argument is foreclosed by *Smith*:

> Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by

---

[11] The Seattle ordinance applies to "[a]n object, site or improvement which is more than twenty-five (25) years old . . . if it has significant character, interest or value, as part of the development, heritage or cultural characteristics of the City, state or nation" and falls within one of six identified categories. SMC 25.12.350 (App. 53a). New York City's Landmarks Preservation Law applies similarly to "'[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value.'" *St. Bartholomew's Church*, 914 F.2d at 354 (quoting N.Y.C. Admin. Code § 25-302(n) (1986)).

[12] *Cf. Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 132 (1978) (rejecting argument that New York City Landmarks Law was discriminatory, observing that the law "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city").

> religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.

Smith, 110 S. Ct. at 1602.[13]

b. Decisions of this Court make it clear that the two "burdens" on free exercise identified by the Washington Supreme Court do not warrant application of strict scrutiny analysis.[14] First, the state court noted that the ordinances would require respondent to "seek secular approval" of any changes proposed in the future to the building's facade, and to negotiate possible alternative design solutions to those changes required by liturgy. (App. 13a). Second, the court credited the allegation that the market value of the church property, as a result of the landmark designation, had depreciated from $700,000 to $400,000. (App. 5a). *See also* App. 21a-25a (Utter, J., concurring).[15] Neither of these "burdens" is of constitutional significance.

---

[13] In *Smith*, this Court observed that "[t]he only decisions in which [the Court has] held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action[s] have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." 110 S. Ct. at 1601. This case does not involve any such "hybrid claim."

[14] *See Swaggart*, 110 S. Ct. at 693 (a neutral regulation may offend the constitutional requirement of neutrality only "if it *unduly* burdens the free exercise of religion") (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972)) (emphasis added); *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2148 (1989) ("[t]he free exercise inquiry asks whether the government has placed a *substantial* burden on the observation of a central religious belief or practice") (emphasis added).

[15] The Washington Supreme Court's figures were based upon an affidavit filed by the church, in superior court, in opposition to petitioner's motion for summary judgment. The issue of whether landmark designation reduced the value of church property was never passed upon by the superior court, which held that the question was not ripe for review. (App. 30a-31a).

(i) *Secular Approval.* The state court found that respondent's right of free exercise was violated by the requirement that it seek secular approval should it wish, in the future, to alter the building's exterior. (App. 13a-16a).[16] Recent decisions of this Court make clear, however, that the interaction contemplated by landmark ordinances between government and the owner of a historic structure should not raise First Amendment concerns. *See Swaggart*, 110 S. Ct. at 697-99 (rejecting argument that on-site inspections, and alleged "layers of administrative . . . proceedings" impermissibly enmeshed the government in religious affairs); *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2147 (1989) (same); *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (since the government would not be intruding on the day-to-day operations of religious organization, grant monitoring required by statute did not amount to excessive entanglement); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985) (the First Amendment "does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations").

Respondent did not suggest, nor did the court below hold, that requiring the Church to interact with secular authorities would in any way coerce the church into acting contrary to its religious principles. *Cf. St. Bartholomew's Church*, 914 F.2d at 356 n.4 (requirement that church submit architectural plans to secular review "does not rise to the level of unconstitutional entanglement"). Although indirect coercion or penalties on the free exercise of religion may be subject to scrutiny under the First Amendment, "[t]his does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting

[16] The court observed, for instance, that the regulation would "requir[e] additional paperwork, negotiations and hearings." (App. 5a).

contrary to their religious beliefs, require the government to bring forward a compelling justification for its otherwise lawful actions." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. at 450-51.

(ii) *Economic Impact.* The First Amendment does not guarantee that "religious groups . . . are free from all financial burdens of government." *Swaggart*, 110 S. Ct. at 694 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943)). To be sure, if a regulation imposes financial burdens so significant as to "effectively choke off an adherent's religious practices," *Swaggart*, 110 S. Ct. at 697, then the free exercise clause may be implicated. *Cf. Murdock*, 319 U.S. at 115. But as this Court reaffirmed in *Swaggart*, "to the extent that imposition of a generally applicable [regulation] merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant." 110 S. Ct. at 696 (citing *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2149 (1989)). Respondent has not contended that the alleged reduction in the value of its property has in any way affected (much less "choked off") its ability to carry out its religious mission.

3. *Issue of Public Importance.* Finally, review in this case is warranted in order to provide guidance to lower courts in an area of substantial public importance.[17] The

[17] Similar issues are currently pending in lower courts. *See Society of Jesus in New England v. Boston Landmarks Comm'n*, Nos. 87-3168, 87-4751, 87-6586 (Mass. Super. Ct. Nov. 2, 1989), *appeal docketed*, No. SJC-5415 (Mass. argued Nov. 6, 1990); *cf. Alger v. City of Chicago*, No. 90C2778, 1990 U.S. Dist. LEXIS 12492 (Sept. 19, 1990) (Establishment Clause challenge to landmark ordinance exempting religious buildings dismissed for lack of standing), *motion for reconsideration filed* (N.D. Ill. Oct. 3, 1990). The Washington Supreme Court recognized the national significance of its decision, writing: "[t]he interests of the City and the Church are substantial and a determination by this court as to the constitutionality of the landmarks ordinance will clarify valuable property

decision of the Washington Supreme Court, effectively exempting all properties owned by religious organizations from landmark regulation, is both sweeping and unprecedented. As one commentator has observed, the blanket exclusion of churches and other religious structures from the protection of historic preservation laws would seriously undercut efforts to preserve the physical heritage of our communities:

> The purpose of historic preservation statutes is to preserve irreplaceable buildings having cultural, architectural, or historical significance. Churches often are distinctive or even unique in their architectural design and frequently are historically significant. Therefore, churches often will be designated as historic properties and will play an integral part in any historic preservation program. . . . If churches were excluded from historic districts whenever the congregation invoked first amendment claims, it would be difficult to preserve the unity of a historic district. Undue deference to churches would result in an even more rapid loss of historic structures.

Note, *Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution*, 63 N.C.L. REV. 404, 418 (1985).

The public interest in historic preservation is well documented and was affirmed by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).[18] The Court noted in *Penn Central* that "all 50

---

rights of churches and their freedom to practice religion. A decision here will be welcomed throughout the United States[.]" (App. 6a).

[18] Historic preservation laws are also rooted in antiquity. Gibbon recounted the efforts of Emperor Majorian (A.D. 453) to preserve the historic structures of ancient Rome:

> The decay of the city had gradually impaired the value of the public works. The circus and theatres might still excite, but they seldom gratified, the desires of the people: the temples which had escaped the zeal of the Christians were no longer inhabited either by gods or men . . . and the stately libraries

States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance." *Penn Central*, 438 U.S. at 107. These nationwide efforts were precipitated, in part, by the "widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today." *Id.* at 108.

The Washington Supreme Court has subjected to wholly unwarranted strict scrutiny, and then invalidated, an important aspect of Seattle's attempt to preserve its physical heritage. The decision conflicts squarely with a decision of the Second Circuit and disregards recent rulings of this Court that should have been dispositive. If followed elsewhere, the decision would eliminate a core part of a program deemed important by every state and numerous municipalities. The state court's attempt to define the relationship between the free exercise of religion and the public interest in historic preservation amply warrants this Court's review.

---

and halls of justice became useless to an indolent generation whose repose was seldom disturbed either by study or business. . . . Majorian, who had often sighed over the desolation of the city, applied a severe remedy to the growing evil. He reserved to the prince and senate the sole cognisance of the extreme cases which might justify the destruction of an ancient edifice; imposed a fine of fifty pounds of gold . . . on every magistrate who should presume to grant such illegal and scandalous license; and threatened to chastise the criminal obedience of their subordinate officers by a severe whipping and the amputation of both their hands.

2 E. GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 315 (rev. ed. 1989) (footnote omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK H. SIDRAN
City Attorney
ROBERT D. TOBIN
Assistant City Attorney
600 Fourth Ave.
Seattle, WA 98104
(206) 684-8200

LOUIS R. COHEN *
LLOYD N. CUTLER
TERESA D. BAER
MARK D. CAHN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Petitioner

December 1990

* Counsel of Record